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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1669

FIRST BANK OF OAK PARK, an Illinois banking corporation,

Petitioner,

vs.

UNITED CALIFORNIA BANK, a California banking corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Petitioner First Bank of Oak Park respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Two.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two, is reported at 93 Cal. App. 3d 439, 159 Cal. Rptr. 607 (1979) and is set out in Appendix A to this Petition. The order of the Supreme Court of California denying Petitioner's Petition For Hearing is reprinted in Appendix B. The order of the Superior Court of Alameda County quashing service of summons upon petitioner for lack of jurisdiction is unreported but is set forth in Appendix C.

JURISDICTION

The decision of the Court of Appeal of the State of California was entered on November 6, 1979. After unsuccessfully seeking a rehearing in the Court of Appeal, petitioner filed a Petition For Hearing with the Supreme Court of California which was denied on January 24, 1980. This petition for certiorari was filed within ninety days of that date. The jurisdiction of the Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Is an Illinois banking corporation which transacts no business and has no presence in California subject to the *in personam* jurisdiction of the courts of California in an action to collect a non-negotiable certificate of deposit which the Illinois bank issued in Illinois to a Delaware corporation, and which the Delaware corporation assigned to a California bank?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, § 410.10.

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

STATEMENT OF THE CASE

The federal constitutional question presented is whether California can compel an Illinois bank to defend a suit in a California court to collect a non-negotiable certificate of deposit issued by the Illinois bank and subsequently pledged to a California bank. Petitioner moved in the trial Court to quash service of summons and complaint on the ground that California had no *in personam* jurisdiction over petitioner. (CT 10-11)[1] In support of that motion petitioner argued, *inter alia,* that the exercise of jurisdiction by the California court in this case would violate due process of law. (CT 14 *et seq.*)

1. The certified copy of the record below has been filed with this Petition. References to the record in the trial Court are made by the prefix "CT" followed by the page number. References to other documents in the record are made by document description, followed by the page number of the document.

The trial Court found "that there exists no basis for the exercise of jurisdiction by a court of this state" over petitioner, and granted petitioner's motion to quash. (Appendix C, p. A9) Respondent appealed and the Court of Appeal reversed on the ground that the California courts could subject petitioner to personal jurisdiction because petitioner had issued a certificate of deposit ("CD") which its officers knew might be used to finance a grape-growing venture in California, ". . . and that the certificate of deposit would be worthless security for the loan issued in California because Oak Park could cancel the certificate against its own loan to Gleaco." (Appendix A, p. A2)

Petitioner is a banking corporation chartered under the laws of Illinois with its business offices located exclusively in the Village of Oak Park, Illinois. (CT 24) Petitioner does not transact business in California and never has transacted business in California. (CT 24)

On February 14, 1975 petitioner lent $350,000 to Gleaco Corporation, a Delaware corporation ("Gleaco"), evidenced by a demand promissory note. (deMoya Dep., pp. 28, 38)[1] The transaction took place in Illinois. John S. Gleason, Jr. ("Gleason"), the President of Gleaco (CT 32) and an Illinois resident (CT 168), executed and delivered to petitioner Gleaco's note. (Ott Dep., pp. 63-4) The borrowed funds were deposited by

1. Transcripts of the depositions referred to herein appear in one document filed in the Court of Appeal by respondent and entitled, "Appellant United California Bank's Application To Take New Evidence On Appeal And Alternative Request To Take Judicial Notice".

On appeal respondent moved, under a provision of the California Evidence Code, for the Court of Appeal to take new evidence, or for the Court to take judicial notice of certain facts. In connection with that motion respondent filed transcripts of depositions taken of one officer and two former officers of petitioner in a case brought by the Federal Deposit Insurance Company against petitioner and pending in the federal District Court in Chicago. *Federal Deposit Insurance Corporation* v. *First Bank of Oak Park*, No. 76 C 3925 (N. D. Ill.) The Court of Appeal denied the motion, but then, after oral argument, reversed itself and granted the motion.

Gleaco with petitioner, and petitioner issued a non-negotiable certificate of deposit for $350,000, payable to Gleaco. A copy of the CD is annexed to respondent's complaint. (CT 9)

Gleason apparently carried the CD to California, and Gleaco pledged and assigned it to the First State Bank of Northern California ("Northern") to secure a personal loan to Gleason of $350,000.[1] Respondent purchased a 90 per cent participation in Northern's personal loan to Gleason. (CT 8)

Deposition testimony placed in the record before the Court of Appeal by respondent shows that petitioner received no notice of any assignment, pledge, posting, deposit or other disposition of the non-negotiable CD prior to the exercise of petitioner's right to set-off Gleaco funds deposited with petitioner against sums due petitioner from Gleaco. (deMoya Dep., pp. 74-75, 91-95; Ott Dep., pp. 82-90; O'Keefe Dep., pp. 39, 46-47)

In early February 1976 the Gleaco loan was delinquent and petitioner demanded payment by February 17. (deMoya Dep., pp. 93-94) Gleaco, Gleason and other related entities filed petitions under Chapter XI of the former Bankruptcy Act in mid-February 1976. (CT 3) Shortly after Gleaco filed for bankruptcy, petitioner set off the CD against its loan to Gleaco. (CT 3)

On May 21, 1976 Northern failed and the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver. (CT 27) At or about that same time respondent set off funds held by it for Northern against the funds it had advanced for its 90 per cent participation in Northern's loan to Gleason. (CT 2)

Two other suits are pending which are related to this action. Respondent's suit against petitioner was filed January 27, 1977,

1. The Assignment was executed by Gleaco, ". . . as security for the payment of our note . . ." (CT 32), but only Gleason is a signatory on the note. (CT 30) Respondent alleges that the security for Northern's loan to Gleason was the non-negotiable CD (CT 2), and that the CD "had been pledged as security for the Gleason loan". (CT 3, 4)

in three counts, *viz.*, for a declaratory judgment that petitioner's set-off of the funds represented by the CD against Gleaco's debt was improper, for damages of $326,900 plus interest, and for punitive damages of $5 million. (CT 1-9) The first related suit is *FDIC* v. *United California Bank*, filed September 1, 1976 and pending in the Superior Court of Alameda County, California, No. 485056-2. The FDIC, serving as Receiver of Northern, claims that respondent wrongfully set off against funds of Northern on deposit with respondent a sum equal to respondent's 90% participation interest in Northern's $350,000 loan to Gleason, plus interest.

The second suit is *FDIC* v. *First Bank of Oak Park*, No. 76 C 3925, filed October 22, 1976 and pending in the U. S. District Court for the Northern District of Illinois, Eastern Division. In this suit FDIC claims that petitioner wrongfully exercised its set-off rights against Gleaco funds on deposit which backed and were represented by the CD. (CT 26-36) To that extent FDIC's suit against petitioner parallels respondent's instant action against petitioner. The Illinois suit was filed by FDIC at the demand of respondent.[1]

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW HOLDING THAT THE COURTS OF CALIFORNIA HAVE IN PERSONAM JURISDICTION OVER PETITIONER VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND IS CONTRARY TO THE DECISIONS OF THIS COURT.

The California Court of Appeal reversed the judgment of the trial Court and found that it was "reasonable for California

1. On July 1, 1976, more than six months prior to the time respondent filed the instant action, respondent tendered the CD to FDIC and demanded that FDIC "commence legal action against the First Bank of Oak Park". (CT 245-246)

. . . [under California's long-arm statute, Cal. Code of Civ. Proc., § 410.10] . . . to exercise jurisdiction over Oak Park" (Appendix A, p. A5), by applying the "effects test of jurisdiction". (Appendix A, pp. A3-4) In so doing the Court of Appeal wholly failed to apply the "minimum contacts" test of jurisdiction first enunciated in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and subsequently followed and applied by this Court. *World-Wide Volkswagen Corporation* v. *Woodson*, 48 U. S. L. W. 4079 (January 21, 1980); *Kulko* v. *Superior Court of California*, 436 U. S. 84 (1978); *Shaffer* v. *Heitner*, 433 U. S. 186 (1977); *Hanson* v. *Denckla*, 357 U. S. 235 (1958).

A. The Court Of Appeal's Opinion Is Based Upon A Decision Which Was Reversed By This Court.

As its primary authority and guide for applying the "effects test of jurisdiction" the Court of Appeal relied upon *Kulko* v. *Superior Court*, 19 Cal. 3d 514, 564 P. 2d 353 (1977). That decision was reversed by this Court. *Kulko* v. *Superior Court of California*, 436 U. S. 84 (1978).

In finding that it was fair and reasonable to subject petitioner to the jurisdiction of the California courts, the Court of Appeal simply ignored the reasoning of this Court in its *Kulko* opinion, and followed solely the reasoning of the California Court in the *Kulko* decision which this Court reversed. The factors which the Court of Appeal considered determinative of the question of jurisdiction were factors which this Court has rejected. The Court of Appeal failed to consider those factors which this Court has mandated must be considered.

B. The Decision Below Is Contrary To The Subsequent Decisions Of This Court In World-Wide Volkswagen Corporation v. Woodson And Rush v. Savchuk.

In *World-Wide Volkswagen* this Court expressly reaffirmed the "long settled" principle that "a state court may exercise

personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. *International Shoe Co.* v. *Washington, supra,* at 316." 48 U. S. L. W. at 4081. The Court of Appeal below did not consider whether petitioner had the requisite minimum contacts in California.

The Court below predicated its decision upon the "facts" that petitioner issued its non-negotiable CD knowing it would be taken to California, thereby causing "effects" upon banks in California, namely, the inability of a California bank lender to realize the value of the CD pledged as security for a loan since "the security would be worthless because of Oak Park's right of offset." (Appendix A, p. A4)

The Court of Appeal applied the "effects" test of jurisdiction in such fashion as to nullify and contradict the "minimum contacts" test promulgated by this Court.[1] The inability of Northern, a California bank, to collect the CD issued by petitioner and which Northern had taken as security for an uncollectible loan, was the result of improper action taken by Northern, i.e., failure to perfect its security interest in the non-negotiable CD by giving notice to petitioner of assignment of the CD. It was not the result of any wrongful action by petitioner. The "effects" test of jurisdiction was improperly applied by the Court of Appeal to stretch California jurisdiction to cover the "effect" of a proper action in Illinois by petitioner that started a chain of events which culminated in damage to a California bank. It is true that had the CD not been issued a California bank could not have taken it as security. But issuance of the CD was not wrongful, improper or violative of any banking regulation. The "but for" theory is not a proper foundation upon which a foreign state may assert *in personam* jurisdiction.

1. This Court has pointed out that the "effects" test is derived from the American Law Institute's Restatement (Second) of Conflicts § 37 (1971), which ". . . was intended to reach wrongful activity outside of the State causing injury within the State, . . .". *Kulko* v. *Superior Court of California,* 436 U. S. at 1699.

See World-Wide Volkswagen, supra, at 4083. The "effects" test should not be applied to proper, legal action taken in a foreign jurisdiction—especially when the actor has not had the requisite minimum contact with the State seeking to assert jurisdiction.

The Court below did not consider whether petitioner's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko* v. *Superior Court, supra,* at 97-98; *Shaffer* v. *Heitner, supra,* at 216; and see *id.,* at 217-219 (Stevens, J., concurring in the judgment)." *World-Wide Volkswagen, supra,* at 4082. The relationship among petitioner, the forum and the litigation was not explored at all. *See Rush* v. *Savchuk,* 48 U. S. L. W. 4088 (January 21, 1980).

The Court below did not consider that the CD was issued in Illinois in a transaction that was completed in Illinois, that the CD was non-negotiable, and that under both Illinois and California law, petitioner's right to set off against that non-negotiable instrument existed until it was placed on notice of the assignment of that instrument. *See Kerner* v. *Kinsey,* 384 Ill. 180, 51 N. E. 2d 126 (1943); *Kamfner* v. *Auburn Park Trust & Savings Bank,* 344 Ill. 200, 176 N. E. 363 (1931); *Chicago Title & Trust Co.* v. *Central Trust Co.,* 312 Ill. 396, 482, 144 N. E. 165 (1924); *Arnold* v. *San Ramon Valley Bank,* 184 Cal. 632, 194 Pac. 1012 (1921); *Willey* v. *Crocker-Woolworth Nat. Bank,* 141 Cal. 508, 75 Pac. 106 (1904).

Petitioner did not set loose upon California banks an instrument which, without more, would have an "effect" in California because it was "worthless". By perfecting its security interest in the CD any holder, bank or otherwise, could have obtained the benefit of the obligation evidenced by the CD. Respondent fully recognized that notice to petitioner was necessary to perfect Northern's security interest in the CD. (CT 257-8) However, the record shows no notice to petitioner of any assignment or pledge of the CD to a California bank, and no acknowledgement

by petitioner of any such pledge or assignment. It may be reasonable for the State of California to require California banks, by statute or regulation, to perfect their security interests when lending money on the security of foreign instruments. But it is unreasonable to construe California's interest in regulating and protecting its banks in such fashion as to insulate those banks from the stupidity and cupidity of their actions, and demand, in effect, that the banks of other States answer in California for all losses incurred by California banks as a result of accepting foreign instruments as security.

The Court of Appeal based its holding upon the happenstance that the certificate was assigned or pledged to a California bank, without considering the fact that it could have been assigned to any bank in any state. Although the Court of Appeal purported to rely on deposition testimony that petitioner knew that the CD was to be brought to California, it failed to recognize that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen, supra,* at 4082.[1] The unilateral activity of Gleason, the president of the Delaware corporation to which the certificate of deposit was issued, in pledging or assigning the non-negotiable certificate as security for a personal loan cannot satisfy the requirement of contact by petitioner with the forum State, to paraphrase *World-Wide Volkswagen, supra,* at 4083.

The Court of Appeal below found that the "difference in interest rates [between petitioner's loan and the certificate of deposit] resulted in substantial economic benefit to Oak Park. This realization of economic benefit from out-of-state activity which caused effects in California makes it reasonable for California to exercise jurisdiction over Oak Park. *Kulko* v. *Superior Court, supra,* 19 Cal. 3d 514; . . ." (Appendix A, p.

1. The depositions of petitioner's officers in the record show they did not know how the CD would be used to finance a grape-growing venture in California. (Ott Dep., p. 60; de Moya Dep., pp. 28, 48; O'Keefe Dep., pp. 18, 22)

A5) The money made by petitioner in the transaction with Gleaco, resulting from the differential between the rate of interest charged on the loan and the rate of interest paid on the CD, cannot serve to support California's jurisdictional assertion.[1] In concluding that the ". . . realization of economic benefit from out-of-state activity which caused effects in California makes it reasonable for California to exercise jurisdiction over Oak Park . . .", (Appendix A, p. A5), the Court below reached beyond the limits imposed on California by its status as a co-equal sovereign in a federal system. The "effect" that ultimately resulted was too tenuous; indeed, had Northern followed accepted banking practices the "effect" would not have occurred at all—the CD would have been collectible. The "effect", or injury that actually occurred in California resulted from ineptness of Northern, a California bank, and of respondent, also a California bank.[2] This "effect" was not a necessary or to-be-expected consequence of issuance of the CD.

This Court has ruled that ". . . [F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. See *Kulko* v. *Superior Court, supra,* at 94-95." *World-Wide Volkswagen, supra,* at 4083. There was no economic benefit to petitioner which resulted from any activity in California. Whatever benefit the petitioner received arose from a transaction which was completed in Illinois. In similar situations both federal and California courts have found the purported economic benefit too tenuous to support jurisdiction. *See Stutsman* v. *Patterson,* 457 F. Supp. 189, 192 (C. D. Cal. 1978) (assignment to a

1. The interest rate on the CD was 6½%. (CT 9) There is nothing in the record which shows the rate of interest on petitioner's loan to Gleaco. Petitioner does not dispute that a differential existed.

2. Respondent's attorneys have taken the position with the FDIC that, "The security for the debt of John S. Gleason, Jr. has been lost through inaction by [Northern] . . . ." (CT 258)

California bank of a letter of credit); *Sibley* v. *Superior Court*, 16 Cal. 3d 442, 447, 546 P. 2d 322, 325 (1976) (guaranty of a bank loan by a California resident).

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko* v. *Superior Court*, 436 U. S. 84, 91 (1978)." *World-Wide Volkswagen, supra*, at 4081. The basic standard to be applied is whether ". . . defendant's contacts with the forum State [are] such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.' *International Shoe Co.* v. *Washington, supra*, at 316, quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)." *World-Wide Volkswagen, supra*, at 4081.

An examination of the relevant factors and facts in this case clearly demonstrates the unreasonableness and unfairness of California in requiring petitioner to litigate—indeed, relitigate —this case in California.

C. Petitioner Is A Non-Resident Of California And Has Virtually No Business Contacts With That State.

This record does not reveal any "presence" by petitioner in California at all. Petitioner has no office, facility or personnel in California. Petitioner solicits no business in California. Petitioner's loan to the Delaware corporation in question was made in Illinois, and petitioner issued its non-negotiable CD in Illinois. Wherever the holder of the CD carried it, and to whomever that holder pledged it, the only manner in which petitioner's right to set off the funds backing the CD could be affected or changed was by notification of that pledge delivered to and received by petitioner in Illinois.

What the Court below did was to resurrect the rule of *Harris* v. *Balk*, 198 U. S. 215 (1905). By treating the physical presence of the holder of the CD as a ground for jurisdiction

(just as in *Harris* v. *Balk* the presence of the debtor was deemed to confer jurisdiction of an action to extinguish the interest of the creditor of the debtor in the debtor's debt) the Court below created *in personam* jurisdiction from discarded *quasi in rem* principles.

In no way did petitioner avail itself of the privilege of conducting business in California, or of the benefits and protections of California laws.

D. Under The Facts And Circumstances Apparent In This Record, Requiring Petitioner To Defend This Action In California Offends Traditional Notions Of Fair Play And Substantial Justice.

Assuming *arguendo* that petitioner caused an "effect" in California by reason of its loan transaction in Illinois, the record clearly illustrates that the exercise by a California Court of jurisdiction over respondent's claim against petitioner would still do violence to the constitutional requirement that the maintenance of this action ". . . not offend 'traditional notions of fair play and substantial justice.' " *International Shoe, supra*, 326 U. S. at 316.

This Court has concluded that in assessing whether a State Court may exercise *in personam* jurisdiction over a nonresident corporate defendant relevant factors to be weighed include an " 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business . . .", *International Shoe, supra*, 326 U. S. at 317, and the disadvantages occasioned by forcing a plaintiff to follow a defendant to a distant forum. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 223 (1957). *See World-Wide Volkswagen, supra*, at 4081. Petitioner, its officers and former officers, and Gleason, the president of the Delaware corporation to which the certificate of deposit was issued, are all Illinois residents, rendering petitioner's defense far

from mobile. Further, it seems clear that requiring petitioner to defend against the same cause of action brought by different parties in different courts more than two thousand miles apart is the kind of "inconvenience" to which this Court referred in *International Shoe, supra.*

Here, prior to the filing of this action in the Superior Court in California, respondent caused FDIC to challenge, in an Illinois forum, petitioner's right to set off the funds backing the CD. On July 1, 1976, respondent delivered the CD to FDIC, as successor-in-interest to Northern as holder of the Gleason note secured by the CD, and demanded that FDIC sue petitioner. FDIC promptly did so, bringing action against petitioner in the United States District Court for the Northern District of Illinois.[1] That action seeks a declaration of the invalidity of petitioner's set-off, and recovery of the monies represented by the CD. However differently worded, respondent's subsequent complaint in this action seeks relief based upon the same allegations. Sound judicial policy designed to avoid a multiplicity of actions strongly militates against continued maintenance of respondent's instant and multiplicitous action in California.

The inconvenience and unfairness to petitioner occasioned by its necessary simultaneous defenses to two similar actions—each seeking the recovery of respondent's investment in Northern's loan to Gleason—is manifest. By allowing the instant action to be brought in California, the Court of Appeal permitted respondent to achieve the "mischievous consequences" this Court has found, albeit in different contexts, to be the impermissible end result of the allowance of separate but simultaneous actions

1. Because petitioner has, to date, not interposed defenses to respondent's cause of action, the question whether respondent has any standing to bring this action has yet to be raised or determined. However, it appears that respondent—as a mere participant in Northern's loan to Gleason—has no standing to sue petitioner. *See In re Yale Express System, Inc.*, 245 F. Supp. 790, 792 (S. D. N. Y. 1965): Armstrong, "The Developing Law of Participation Agreements," 23 Bus. Law. 689, 693 (1969).

relating to the same parties and incidents. *Continental Grain Co.* v. *Barge FBL-585,* 364 U. S. 20, 21 (1960). *See Landis* v. *North American Co.,* 299 U. S. 248, 254-5 (1936); *The Haytian Republic,* 154 U. S. 118 (1894).

Respondent's "play" in bringing this action against petitioner cannot be considered fair by any standard. If only by reason of respondent's affirmative determination to have its rights enforced in Illinois, here, as in *Kulko,* ". . . basic considerations of fairness point decisively in favor of . . . [petitioner's] . . . State of domicile as the proper forum for adjudication of this case . . ." 436 U. S. at 97.

CONCLUSION

The question presented to this Court is of significance to the commerce of the nation. As of September 30, 1978, insured commercial banks had issued and outstanding certificates of deposit in excess of $100,000 face value in an aggregate amount of $186.837 billion. Fed. Res. Bull., March 1980, p. A19 (Detailed Balance Sheet, September 30, 1978, "Commercial Bank Assets and Liabilities", Item No. 127). The certificate of deposit is a widely-used instrument of commerce. The State of California should not be permitted to impair the use of that commercial instrument by subjecting any bank in the United States to the jurisdiction of California courts merely because that bank has issued a certificate of deposit which has been assigned to a California bank.

For the reasons given, petitioner prays that a writ of certiorari be granted to review the decision and opinion below. In the alternative, petitioner prays that the writ be granted, that the decision below of the California Court of Appeal be vacated.

and that this case be remanded to that Court for reconsideration in light of *World-Wide Volkswagen Corporation* v. *Woodson*, 48 U. S. L. W. 4079 (January 21, 1980).

Respectfully submitted,

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APPENDIX A.

Certified for Publication

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
First Appellate District
Division Two

United California Bank, *Plaintiff and Appellant,* vs. First Bank of Oak Park, *Defendant and Respondent.*	Filed November 6, 1979 1 Civil No. 43371 (Sup. Ct. No. 491277-2)

This is an appeal from an order of the trial court quashing the service of summons on the defendant and respondent First Bank of Oak Park (Oak Park). There is some confusion by the attorneys about what facts are in the record.[1] However, the relevant facts for this appeal are summarized as follows:

John Gleason was an Illinois resident. He was the sole shareholder of Gleaco Corporation, a Delaware corporation. Oak Park was a bank incorporated in Illinois. Gleason and Gleaco had previously borrowed money from Oak Park. Gleason, on behalf of Gleaco, applied for a new loan from Oak Park in the amount of $350,000. Oak Park denied the loan because of the manner in which Gleason and Gleaco had repaid prior loans. However, Oak Park agreed to make the loan on the following basis: Gleason, on behalf of Gleaco, on February 14, 1975,

1. United California Bank (appellant) moved this court to take new evidence on appeal. It argued facts taken from its motion in its opening brief. The motion to take new evidence was then denied. On the court's own motion, the new evidence was subsequently taken into the record for appeal.

executed a note to Oak Park for $350,000; Oak Park in turn transferred by intra-bank transfer the borrowed funds and issued to Gleaco a certificate of deposit for $350,000. Oak Park's officers knew that Gleason intended to use the certificate of deposit to obtain financing for a grape-growing venture in California, and that the certificate of deposit would be worthless security for the loan issued in California because Oak Park could cancel the certificate against its own loan to Gleaco.

John Gleason came to California and pledged the certificate of deposit as security for a personal loan in the amount of $350,000, borrowed from the First State Bank of Northern California (Northern). The certificate of deposit was assigned to Northern by Gleason for Gleaco Corporation.

United California Bank (appellant) purchased a 90 percent participation in Northern's personal loan to Gleason. Gleaco defaulted on its loan with Oak Park, and Oak Park canceled the certificate of deposit. Thus, Northern's loan (with appellant's 90 percent participation) was unsecured.

John Gleason filed for bankruptcy in February 1976. He defaulted on his personal loan from Northern on March 4, 1976. Northern was closed and placed in receivership by the Superintendent of Banks for the State of California on May 21, 1976.

The Federal Deposit Insurance Corporation (FDIC) was appointed received for Northern, and by a sale of assets to itself, FDIC acquired the note from Gleason to Northern. FDIC then filed an action in Alameda County against appellant and sought to recover Northern's deposits that appellant used to "offset" the amount of appellant's participation in Northern's loan to Gleason.[2]

Appellant then instituted this action for a declaratory judgment against Oak Park. Appellant seeks a declaration that Oak Park wrongfully offset its loan to Gleaco against the certificate

2. The FDIC also filed an action against Oak Park in the United States District Court for the Northern District of Illinois. The FDIC sought a declaration that the certificate of deposit was valid.

of deposit, and that it is entitled to be indemnified by Oak Park to the extent that an award is made against it in the FDIC action.

Oak Park moved the trial court to quash the service of summons on it on the ground of lack of jurisdiction or, in the alternative, to stay or dismiss the action on the ground of inconvenient forum. The motion to quash was granted by the trial court and led to the instant appeal.[3]

Appellant asks this court to hold that the exercise of jurisdiction over Oak Park is proper under California's long-arm statute, section 410.10 of the Code of Civil Procedure. Section 410.10 states that California may exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States."

Appellant contends that the court should exercise jurisdiction over the defendant on the theory that if a defendant has caused effects in this state by his out-of-state act or omission, the state may exercise jurisdiction over the defendant (Kulko v. Superior Court (1977) 19 Cal. 3d 514; Sibley v. Superior Court (1976) 16 Cal. 3d 442).[4] The effects theory is discussed in the Judicial Council Comment to the Code of Civil Procedure for section 410.10: "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere, with respect to causes of action arising from those effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." Appellant argues that consistent with

3. The facts before the trial court were different than as recounted above. New evidence, taken in the record for appeal, has changed the nature of the case. Our decision need not involve any disapproval of the trial court's action in view of the evidence before it.

4. The "effects" test of jurisdiction is an outgrowth of the seminal case of Internat. Shoe Co. v. Washington (1945) 326 U. S. 310, 316, which stated that the test for personal jurisdiction over out-of-state defendants was "minimum contacts" sufficient to satisfy " 'traditional notions of fair play and substantial justice.' " (See Hanson v. Denckla (1958) 357 U. S. 235; McGee v. International Life Ins. Co. (1957) 355 U. S. 220.)

the effects test of jurisdiction, the exercise of jurisdiction is reasonable in the instant case because: 1) Oak Park did an intentional act knowing that it would cause effects in California, the nature of which California deems to be exceptional and subject to special regulation, and 2) Oak Park anticipated an economic benefit from its act which caused the effect in this state.

We agree with both of appellant's contentions, and, therefore, the ruling of the trial judge must be reversed.

In Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 306, the court said, "we conclude that it is reasonable to exercise jurisdiction on the basis of the defendant intentionally causing 'effects in the state by an omission or act done elsewhere' whenever (a) the effects are of a nature 'that the State treats as exceptional and subjects to special regulation,' . . . ." *Quattrone* is controlling in this case. An examination of the record makes it abundantly clear that respondent, Oak Park, issued the certificate of deposit knowing that Gleason intended to take it to California and use it as security for a loan, and that the security would be worthless because of Oak Park's right of offset. The effects caused was the extension of a loan to Gleason which in effect was unsecured and ultimately became uncollectible. Both effects are treated as exceptional and are subject to regulation in California. The types and amounts of loans and the types and values of security which state banks must obtain for those loans are regulated by the state (Fin. Code, §§ 1220-1236). No further citations are needed to support the conclusion that California deems state chartered banks exceptional and subject to special regulation. Consequently, under the holding of *Quattrone*, it is reasonable to require Oak Park to appear and defend this lawsuit in California.

Additionally, we hold that it is reasonable to exercise jurisdiction over Oak Park because Oak Park anticipated that it would derive an economic benefit as a result of its out-of-state activities which caused effects in California. That Oak Park

anticipated such economic benefits is apparent from the record. By making the loan to Gleaco, which was immediately reinvested in the Oak Park certificate of deposit, Oak Park had made a risk free loan. Meanwhile, it collected interest on the loan in excess of the interest it paid on the certificate of deposit. This difference in interest rates resulted in a substantial economic benefit to Oak Park. This realization of economic benefit from out-of-state activity which caused effects in California makes it reasonable for California to exercise jurisdiction over Oak Park (Kulko v. Superior Court, supra, 19 Cal. 3d 514; Sibley v. Superior Court, supra, 16 Cal. 3d 442).

In view of our conclusion, the additional issues raised by the parties need not be discussed.

The order of the trial court quashing service of summons is reversed.

CERTIFIED FOR PUBLICATION.

.....

Calhoun, J.*

WE CONCUR:

.....

Taylor, P. J.

.....

Miller, J.

Trial Court:

Superior Court, County of Alameda

Trial Judge:

John Sparrow

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1/Civil 43371
United California Bank v. First Bank of Oak Park

---

* Assigned by the Chairperson of the Judicial Council.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
In and for the First Appellate District
Division Two
Filed Dec. 6, 1979

United California Bank, etc.,
Plaintiff and Appellant,

vs.

First Bank of Oak Park, etc.,
Defendant and Respondent.

No. 43371
Superior Court No. .....

By the Court:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated Dec. 6, 1979

/s/ Taylor P.J.

APPENDIX B.

ORDER DUE
February 4, 1980

ORDER DENYING HEARING

After Judgment by the Court of Appeal

1st District, Division 2, Civil No. 43371

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

Filed January 24, 1980

UNITED CALIFORNIA BANK

vs.

FIRST BANK OF OAK PARK

Respondent's petition for hearing Denied.

Clark, J., is of the opinion that the petition should be granted.

Bird
Chief Justice

APPENDIX C.

Filed August 9, 1977

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

In and for the County of Alameda

United California Bank, a California banking corporation,
Plaintiff,

vs.

First Bank of Oak Park, an Illinois banking corporation, Does One through Four, inclusive,
Defendants.

No. 491277-2

ORDER QUASHING SERVICE OF SUMMONS AND COMPLAINT

Defendant First Bank of Oak Park appeared specially to move this Court for an order quashing service of summons and complaint upon said defendant on the ground of lack of jurisdiction over said defendant or in the alternative for an order staying or dismissing this action on the ground of inconvenient forum. Said motion came on regularly for hearing on August 1, 1977, Steven W. Parnes, Esq., appearing for said defendant in support of said motion and Robert L. Lofts, Esq., appearing for plaintiff in opposition thereto. The Court, on the basis of the papers on file herein and evidence offered at said hearing, having found that there exists no basis for the exercise of jurisdiction by a court of this state over defendant First Bank of Oak Park consistent with Code of Civil Procedure Section 410.10, which defines the permissible bases for the exercise of jurisdiction by the courts of this state,

It Is Hereby Ordered that the service of summons and complaint upon defendant First Bank of Oak Park be and hereby is quashed.

Dated: August 1, 1977
and Presented and Signed

August 9, 1977

John P. Sparrow
Judge of the Superior Court

Supreme Court, U.
FILED
MAY 15 1980
MICHAEL RODAK, JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1669

FIRST BANK OF OAK PARK, an Illinois banking corporation,
Petitioner,

vs.

UNITED CALIFORNIA BANK, a California banking corporation,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal
of the State of California
First Appellate District, Division Two

Respondent's Brief in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

FIRST BANK OF OAK PARK, an Illinois banking corporation,
Petitioner,

vs.

UNITED CALIFORNIA BANK, a California banking corporation,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District, Division Two

---

Respondent's Brief in Opposition

Respondent United California Bank ("UCB") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeal of the State of California, First Appellate District, Division Two. That decision is reported at 98 Cal.App.3d 439, 159 Cal.Rptr. 607 and is reproduced as Appendix A to the petition.

QUESTION PRESENTED

Is an Illinois bank subject to *in personam* jurisdiction in California in a suit arising from the Illinois bank's creation

of a false certificate of deposit, when the Illinois bank derives an economic benefit from the transaction and knows that its customer will use the certificate of deposit fraudulently to obtain a loan from a California bank?

STATEMENT OF THE CASE

Because First Bank of Oak Park ("Oak Park") carefully elides the critical factual findings of the California Court of Appeal, it is necessary to correct the petition's statement of the case. Oak Park's factual recitation attempts to create the impression that all Oak Park did here was issue a certificate of deposit like any of the thousands of certificates issued each day by banks across the country. The California court found otherwise and, based on that factual determination, held California had *in personam* jurisdiction over Oak Park.

In February 1975, General John S. Gleason ("Gleason") applied to Oak Park for an unsecured, $350,000 loan to finance a grape-growing venture in California (O'Keefe, 13-15; Ott, 39, 52-53; de Moya, 25-27.)[1] At that time, Gleason already had outstanding from Oak Park a $50,000 unsecured loan (O'Keefe, 6; Ott, 16, 63; de Moya, 48) which Oak Park had had difficulty collecting (Ott, 30-31).

Because of those difficulties, Oak Park refused Gleason's request for the $350,000 loan. (Ott, 64.) As O'Keefe, chairman of Oak Park's executive committee explained, "in its present form we didn't feel the credit was acceptable." (O'Keefe, 17.) Oak Park's president, de Moya, also thought Gleason a questionable credit risk:

> I told him that he had not handled his obligations properly at First Bank of Oak Park. . . . He didn't

1. The references are to the three depositions of which the Court of Appeal took judicial notice. "C.T." references are to pages of the Clerk's Transcript on Appeal. The depositions and the Clerk's Transcript are part of the certified record transmitted to this Court under its Rule 21(2).

> give prompt attention to maturity dates, dates of notes, interest notices, and requests for payment programs. (de Moya, 30-31.)

Undaunted, Gleason returned to Oak Park shortly thereafter with a new proposal which Oak Park did accept. Under this new scheme, Oak Park loaned $350,000 to Gleaco Corporation ("Gleaco"), a company wholly owned by Gleason. (C.T., 31.) That $350,000, however, never left Oak Park's vault. Instead, by intra-bank transfer, Oak Park credited Gleaco with a $350,000 deposit and gave Gleaco a non-negotiable $350,000 certificate of deposit to evidence the transaction. (C.T., 25:4-8; O'Keefe, 21-22, de Moya, 48.) Since Oak Park could offset the loan against the deposit at any time, this transaction was risk-free to it.

Moreover, as part of the deal, the interest payable to Gleaco on the certificate of deposit was automatically applied against the interest due Oak Park on the loan. Oak Park sent Gleason bills only for the amount by which interest on the loan exceeded interest on the certificate of deposit. (Ott, 76, 123-128; de Moya, 65.) The record does not reveal the precise amount of the interest differential. However, by law it could not have been less than one percent per annum, or $3,500 per year. (12 C.F.R. § 329.4(h); Ott, 92.)

Thus, the transaction created a riskless profit for Oak Park and a guaranteed loss for Gleaco. Gleaco had agreed to pay at least $3,500 per year for a piece of paper, the certificate of deposit, which though seeming to evidence a $350,000 deposit, could be rendered worthless at any time by Oak Park's offsetting its loan. Standing alone, the transaction made no economic sense.

The Oak Park loan-certificate-of-deposit transaction was, of course, never intended to stand alone. Gleason still wanted a real $350,000 loan to finance his California grape-growing venture, and he intended to use the certificate of deposit to get that loan.

Oak Park was fully aware of this fact. At the time it issued the certificate of deposit, Oak Park's president knew that Gleason was on his way to California to discuss financing with a California bank. (de Moya, 32, 39.) Gleason told Oak Park's principal officers that he intended to use the certificate of deposit to obtain that financing. (Ott, 60, 65-66, 96; de Moya, 48.) Oak Park also knew exactly how Gleason would use the certificate to get that financing:

> Q. [Counsel] How did you believe he was going to use the C.D.?
>
> [... colloquy between counsel]
>
> A. [de Moya] Well, one way to do it would be to take the certificate of deposit to another bank, borrow the money, and put that certificate of deposit up as collateral for the loan with the lending bank notifying First Bank of Oak Park that it held as collateral, and asking acknowledgment of that assignment from First Bank of Oak Park.... (de Moya, 49-51.)

Armed with the certificate of deposit, Gleason proceeded to fulfill Oak Park's expectations. He came to California and, by assigning the Oak Park certificate of deposit as collateral, obtained from First State Bank of Northern California ("Northern") the $350,000 which Oak Park had refused to lend him in the first place. (C.T., 27, 30, 31, 33-34.)[2]

On March 6, 1975, Northern wrote Oak Park that it had made the $350,000 loan to Gleason secured by an assign-

2. The fact that the certificate of deposit was issued by *Oak Park* undoubtedly helped induce Northern to accept it as collateral. Northern could hardly expect to be defrauded by a sister bank which owned 15 percent of Northern's capital notes. (C.T., 57:18-22; 71:6-8, 173.)

ment of the certificate of deposit. (C.T., 28, 35, 54:1-3.)[3] Thereafter, UCB purchased a 90 percent participation in Northern's loan and took possession of the certificate of deposit.

Oak Park's reservations about Gleason's credit-worthiness proved prescient. In February, 1976, both Gleason and Gleaco filed bankruptcy. (C.T., 3:6-8, 28.) Shortly thereafter, Oak Park offset the balance due on its loan to Gleaco against the certificate of deposit, leaving a zero balance as collateral for Northern and UCB. (C.T., 3:13-23, 28.)

Oak Park's machinations with Gleason and Gleaco thus came to their predictable end. Without attempting to collect from the guarantor of its loan to Gleaco, and without notice to Northern or UCB, Oak Park brought its sham loan-certificate-of-deposit deal full circle, leaving Northern and UCB with worthless collateral and a bankrupt borrower.

Partly as a result of this transaction, Northern's financial condition deteriorated beyond repair. It was closed by the California Superintendent of Banks on May 21, 1976. The Federal Deposit Insurance Corporation ("FDIC") later stepped in as receiver. (C.T., 27.)

On January 27, 1977, UCB brought this action against Oak Park to recover its damages resulting from Oak Park's creation of, and offset against, the certificate of deposit. (C.T., 1-9.) Oak Park moved to quash service of summons, claiming California lacked personal jurisdiction over it, and also moved to dismiss the action on forum non conveniens grounds. (C.T., 10-25.) The trial court granted the motion to quash. (Petition, Appendix C.)[4] The Court of Appeal reversed and remanded the case for trial, and the

3. In their depositions, Oak Park's officers claimed they never saw this letter. (de Moya, 91-95; Ott, 82-90; O'Keefe, 46-47.)

4. The trial court did not rule on Oak Park's motion to dismiss, its ruling on the motion to quash having rendered the motion to dismiss moot.

California Supreme Court denied a hearing. (Petition, Appendices A, B.)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petition Is Based on a Misstatement of Facts.

Oak Park's entire argument is based on a view of the facts totally at variance with those the California Court of Appeal found true.

Oak Park urges that it should not be dragged to California because all it did was issue a certificate of deposit in Illinois, an act "not wrongful, improper or violative of any banking regulation." (Petition, 8.) According to Oak Park, the certificate "could have been assigned to any bank in any state," and it was only through the "unilateral activity of Gleason" that the certificate found its way to California. (*Id.*, at 10.) Oak Park baldly asserts that it "did not set loose upon California banks an instrument which, without more, would have an 'effect' in California because it was 'worthless.'" (*Id.*, at 9.) In sum, Oak Park argues that all it did was issue a certificate of deposit like thousands of others issued every day, and it should not be hauled before California courts "merely because [it] has issued a certificate of deposit which has been assigned to a California bank." (*Id.*, at 15.)

The California Court of Appeal found an entirely different set of facts to be true. Unlike the thousands of other certificates of deposit issued daily, the lower court found that Oak Park's certificate was issued with the proceeds of a loan from Oak Park. (Opinion, A1-A2.)[5] Since Oak Park could call the loan at any time and offset it against the certificate of deposit, the certificate did not truly evidence any bank indebtedness despite its contrary appearance. (See C.T., 31.)

5. "Opinion" references are to the California Court of Appeal opinion as reproduced in Appendix A to the petition.

More importantly, the Court of Appeal found that Oak Park knew from the outset that the certificate would be taken to California and would be used there to defraud a California bank. According to the Court of Appeal, "Oak Park's officers knew that Gleason intended to use the certificate of deposit to obtain financing for a grape-growing venture in California, and that the certificate of deposit would be worthless security for the loan issued in California because Oak Park could cancel the certificate against its own loan to Gleaco." (Opinion, A2.) The Court of Appeal further concluded: "An examination of the record makes it abundantly clear that respondent, Oak Park, issued the certificate of deposit knowing that Gleason intended to take it to California and use it as security for a loan, and that the security would be worthless because of Oak Park's right of offset." (*Id.*, at A4.)

If all Oak Park had done here was issue a normal certificate of deposit, it would be correct in arguing that it did not submit itself to California jurisdiction. But those are not the facts the California Court of Appeal found to be true. The lower court found that Oak Park had knowingly and intentionally participated in and aided a scheme to use worthless security to defraud a California bank.[6] The facts

6. Oak Park argues that Northern could have protected itself against this fraud by perfecting its security interest in the certificate of deposit through notice to Oak Park of the assignment. (Petition, 8, 9-10.) This argument is fallacious. First, there is evidence that Northern did notify Oak Park of the assignment. (C.T., 28, 35, 54:1-3.) Second, Oak Park never would have acknowledged that assignment because by doing so it would have lost its right of offset, its $350,000 loan would no longer have been riskless, and it would have been in precisely the same position as if it had accepted Gleason's original loan proposal. Third, contributory negligence is no defense to a fraud action; "no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." (*Chamberlin v. Fuller*, 59 Vt. 247, 256, 9 A. 832, 836 (1887); Prosser, Torts 716-717 (4th ed. 1971).)

the lower court found make California's assertion of jurisdiction eminently reasonable.

This Court does not, of course, "grant a certiorari to review evidence and discuss specific facts." (*United States v. Johnston,* 268 U.S. 220, 227 (1925).) "Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here." (*Time, Inc. v. Firestone,* 424 U.S. 448, 463 (1976).)

As shown in the Statement of the Case portion of this brief, there was ample, if not overwhelming, evidence to support the Court of Appeal's factual findings. There is no reason for this Court to grant certiorari simply to second-guess the lower court's factual determinations.

2. The Facts of This Case Are Unique.

The petition should also not be granted because a decision in this case would not eliminate harmful precedent or guide determination of future cases. The facts of this case are unique.

This Court's prior jurisdictional decisions have all been in cases involving recurrent factual situations. *Kulko v. Superior Court,* 436 U.S. 84 (1978) concerned a typical child-custody and support problem between parents living in different states. *World-Wide Volkswagen Corp. v. Woodson,* 100 S.Ct. 559 (1980) involved a common local sale of goods later removed to another state by the buyer without the seller's knowledge. *Rush v. Savchuk,* 100 S.Ct. 571 (1980) involved the constantly recurring *Seider v. Roth* problem of a non-resident defendant insured by a resident insurance company. In all of these cases, the Court's decision provided important guidance to lower courts since the

factual pattern of the case which the Court decided was typical of a recurring problem or transaction.

Such is not the case here. While thousands of ordinary certificates of deposit are issued every day by banks across the country, few if any of those certificates are issued against the proceeds of a totally offsetting loan from the issuing bank. Fewer still are the certificates of deposit issued by a bank which knows the certificate will be taken to a foreign state for use in defrauding a foreign bank. And this is undoubtedly the only case in which despite such knowledge, the bank not only made the offsetting loan and certificate of deposit, but also called the loan, offset it against the certificate, and thus rendered the foreign bank's security worthless.

In short, a decision in this case will not resolve any common or recurring problem; it will necessarily be limited to the unique facts of this case. By the same token, the Court of Appeal's opinion, even if wrong, will not adversely affect the development of the law governing personal jurisdiction; that opinion, too, is limited by the highly unusual facts of this case. (*See General Council v. Superior Court,* 99 S.Ct. 35, 38 (Rehnquist, J., in chambers).)

3. The Court of Appeal Applied the Proper Jurisdictional Test.

As the Court of Appeal correctly noted, this case is governed by the jurisdictional "theory that if a defendant has caused effects in this state by his out-of-state act or omission, the state may exercise jurisdiction over the defendant. [Citations.]" (Opinion, A3.)

This "effects" test of jurisdiction is a direct outgrowth of this Court's decision in *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957). (See Opinion, A3 n. 4; Restatement (Second) of Conflict of Laws § 37, Comment a (1971).) In *Kulko v. Superior Court,* 436 U.S. 84, 96 & n. 11 (1978),

this Court quoted with apparent approval the precise language used by the Court of Appeal in this case to define the "effects" test. (See Opinion, A3.)[7]

The "effects" test has been codified in section 37 of the Restatement (Second) of Conflict of Laws and has been followed by numerous decisions of the state and federal courts.[8]

The legal test which the Court of Appeal applied was proper.

4. The Court of Appeal Correctly Applied the Effects Test to the Facts of This Case.

The California Court of Appeal reached the correct result applying the "effects" test to the facts it found to be true.

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7. Oak Park argues that the Court of Appeal incorrectly adopted the California Supreme Court decision in *Kulko* "[a]s its primary authority and guide for applying the 'effects test of jurisdiction,'" even though this Court reversed that decision. (Petition, 7.) This argument mischaracterizes the Court of Appeal's opinion, which cites *Kulko* only twice and specifically finds *Quattrone v. Superior Court*, 44 Cal.App.3d 296, 118 Cal.Rptr. 548 (1975) to be "controlling in this case." (Opinion, A4.) The argument also mischaracterizes this Court's decision in *Kulko*. This Court did not reject the "effects" test in that case; it merely held that the California Supreme Court had misapplied the test to the particular facts of that case.

8. *See, e.g., Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 663-664 (1st Cir. 1972); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341, 1342 (2d Cir. 1972); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226-228 (6th Cir. 1972); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143-1144 (7th Cir. 1975); *Fulton v. Chicago, R.I. & P. R.R.*, 481 F.2d 326, 331 (8th Cir. 1973), cert. denied *sub. nom. Soo Line R.R. v. Fulton*, 414 U.S. 1040 (1973); *Data Disc, Inc. v Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1288-1289 (9th Cir. 1977); *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 20 Ariz.App. 517, 514 P.2d 270 (1973); *Smith v. Temco*, 252 S.2d 212 (Miss. 1971); *Young v. Gilbert*, 121 N.J.Super. 78, 296 A.2d 87 (1972); *Roland v. Modell's Shoppers World*, 92 N.J.Super. 1, 222 A.2d 110 (1966); *Singer v. Walker*, 21 App.Div.2d 285, 250 N.Y.S.2d 216 (1964).

Oak Park's acts in Illinois plainly caused dire effects in California. By creating the false certificate of deposit with the proceeds of the offsetting loan, Oak Park caused a California bank to make a loan based on worthless security. By then calling its loan and offsetting against the certificate, Oak Park rendered the California bank's loan uncollectable. Partly as a result of this financial disaster, the California bank has been closed and placed in receivership.

The nature of these effects makes California's assertion of jurisdiction reasonable. As in *McGee v. International Life Ins. Co., supra*, so here California treats these in-state effects as exceptional and subjects them to intensive regulation. (See *Quattrone v. Superior Court*, 44 Cal.App.3d 296, 305-306, 118 Cal.Rptr. 548 (1975).) As state-chartered banks, both UCB and Northern were closely regulated in all aspects of their business and particularly in the types and amounts of loans they made and the types and values of security they took for those loans. (Cal. Fin. Code, §§ 1220-1236; Cal.Admin.Code, tit. 10, ch. 1.) California's elaborate regulatory structure is designed to protect state-chartered banks from unwise and unsafe lending practices, to protect the banks' solvency and to guard their customers' deposits. (*State Sav. etc. Bank v. Anderson*, 165 Cal. 437, 446, 132 P. 755 (1918); *Savings Bank v. Burns*, 104 Cal. 473, 480, 38 P. 102 (1894).) In fact, California's regulation of its state banks is intended to prevent the very harmful effects which Oak Park here caused: substantial losses of fraudulent loans, which contribute to the forced closure of a state-chartered bank with consequent loss to the bank's customers and to the banking system in general.[9]

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9. Contrary to Oak Park's argument (petition, 10), bank regulation is very much designed to "insulate . . . . banks from the stupidity and cupidity of their actions" for the greater security of

Oak Park's relationship to California also makes that state's assertion of jurisdiction reasonable. Despite its protestations of ignorance and innocence, Oak Park was found to have known from the outset of this transaction that the sole reason Gleason was willing to enter into the offsetting loan-and-certificate-of-deposit deal was to obtain the inherently false certificate for use in fraudulently securing a loan from a California bank.[10] Unlike the car dealer in *World-Wide Volkswagen* who had no particular reason to suspect that his customer would take the car to Oklahoma, Oak Park knew all along that its certificate was to be used in California.[11] Oak Park could reasonably anticipate that California's courts would assert jurisdiction over it to protect California citizens against the fraudulent scheme in which Oak Park so willingly participated.

Furthermore, Oak Park's profit from its misdeeds makes California's assertion of jurisdiction reasonable. (See *Sibley v. Superior Court*, 16 Cal.3d 442, 447, 128 Cal.Rptr. 34,

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the banks' depositors and the banking system in general. (*See, e.g.*, Roosevelt, F.D., Radio Address (March 12, 1933); reproduced in White, Banking Law 32-33 (1976).)

10. Oak Park is wrong in arguing that this case involves mere "foreseeability" of the use of the certificate in California. (Petition, 10.) Nor was Gleason's act of bringing the certificate to California "unilateral." (*Ibid.*) The Court of Appeal found that Oak Park knew from the outset that the certificate would be used in California and knew that such use was the only reason why Gleason asked for the certificate in the first place. (Opinion, A2, A4.)

11. Oak Park's argument that the Court of Appeal "resurrect[ed] the rule of *Harris v. Balk* . . ." (petition, 12-13) falters on this same factual finding. The Court of Appeal opinion does not subject a bank which issues a normal certificate of deposit to the jurisdiction of any state to which the certificate-holder may carry it. All the lower court's decision holds is that where, as here, the issuing bank knows that the sole reason for its issuance of the certificate of deposit is to defraud a bank in a particular foreign state, that other state has jurisdiction over the issuing bank.

546 P.2d 322 (1976).) By reason of the difference in interest rates between its loan and its certificate of deposit, Oak Park earned at least $3,500 per year on a transaction which was riskless to it. The relationship between that economic benefit and the dire effects Oak Park caused in California was direct and compelling as the Court of Appeal found, not "tenuous" as Oak Park contends. (*Compare,* Opinion, A4-A5 *with* petition, 11.) Oak Park's riskless loan-and-certificate-of-deposit transaction and the profit Oak Park earned from it would not have occurred but for the anticipated and actual fraudulent use of the certificate in California. Gleason told Oak Park that was his purpose in obtaining the certificate. He would not otherwise have agreed to pay at least $3,500 per year for a worthless piece of paper. Since fraudulent use of the certificate in California was the linchpin of the entire transaction, Oak Park cannot claim that its profit from the deal is somehow unrelated to the fraud in California. But for that fraud, Oak Park would not have earned a dime.

In sum, the Court of Appeal correctly applied the "effects" test to the unique facts of this case, holding that Oak Park had caused effects in California and that the nature of those effects and of Oak Park's relationship to California were such as to make California's assertion of jurisdiction reasonable.

5. The Balance of Conveniences Favors California.

Oak Park's final argument (petition, 13-14) is that the balance of conveniences in this case requires an Illinois forum, not a California one. Oak Park is wrong.

As this Court said in *World-Wide Volkswagen, supra,* 100 S.Ct. at 564-565, "the burden on the defendant, while

always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute [citation]; [and] the plaintiff's interest in obtaining convenient and effective relief. . . . [Para.] The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years."

Here, California has a strong interest in adjudicating this dispute. As already noted, the case involves a fraud perpetrated on California's heavily regulated banking industry. California has demonstrated at least as strong an interest in protecting its banks as in *McGee* it exhibited in protecting its consumers of insurance. (See *Abbott Power Corp. v. Overhead Electric Co.*, 60 Cal.App.3d 272, 280-282, 131 Cal.Rptr. 508 (1976).)

UCB also has a strong interest in litigating its claim in California. Its offices, documents, witnesses and damages are all located in California. As receiver for Northern, FDIC has sued UCB in California state court, asserting that UCB's offset of amounts it owed Northern against the loss UCB suffered on the Gleason loan is improper. (Opinion, A2; C.T., 2:24-3:3.) In this action, UCB seeks a declaration that Oak Park is liable to UCB for any amount UCB must pay FDIC in its action. (C.T., 3:24-4:6.) UCB has a strong interest in having this case and the FDIC action tried in the same court so that it will not be subject to varying adjudications of the same facts. To that end, UCB will shortly file a motion to consolidate the FDIC action with this case. Obviously, if UCB is forced to litigate its claim in Illinois, none of these benefits of a California forum will be available to it.

Oak Park's counterbalancing interests are not so strong. While Oak Park's witnesses and documents are in Illinois, there is no reason to believe that "petitioner's defense [is] far from mobile." (Petition, 13-14.) California procedure permits depositions to be taken of witnesses located in foreign states and permits such depositions to be used at trial if the witness cannot be brought to California. (Cal. Code Civ. Proc., §§ 2016(d)(3), 2018(a), 2019, 2024.) Oak Park has not found it difficult to travel to California when its interests so required. (C.T., 24:22-25:3.)

It is true that Oak Park has been sued by the FDIC in Illinois on claims arising out of this same transaction. But UCB cannot protect its interests in that litigation. As the FDIC's action against UCB in California demonstrates, the FDIC is not UCB's stalking horse. If UCB's action against Oak Park goes forward in California, Oak Park may be inconvenienced by having to litigate in two different states claims arising from the same transaction. But UCB would be equally inconvenienced were it required to sue Oak Park in Illinois, for then it would have to defend the FDIC's action in California while pursuing Oak Park in a distant forum.

"In any balancing of the conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." (*Koster v. Lumbermans Mutual Co.*, 330 U.S. 518, 524 (1947).) UCB has made such a showing of real convenience; it outweighs the inconvenience Oak Park claims.

CONCLUSION

The petition for certiorari should be denied. Oak Park's argument for granting the writ is founded upon a version of the facts not accepted by the lower court. The unique facts of this case are not likely to be repeated; no decision in this case will have any widespread precedential effect.

Furthermore, the California Court of Appeal's decision is based upon a correct legal test properly applied to the facts which that court found to be true. The balance of conveniences as well as the relevant legal doctrines favor a California forum for this litigation.

Respectfully summitted,

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